

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

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|-----------------|---|-------------------------------|
| IN RE |) | |
| |) | Case No. 99-41594 |
| GLEN D. SILCOCK |) | |
| |) | MEMORANDUM OF DECISION |
| |) | |
| Debtor. |) | |
| _____ |) | |

Brent T. Robinson, LING, NIELSEN AND ROBINSON, Rupert,
Idaho, for Debtor.

Jeffrey E. Rolig, ROLIG & PETERSON, L.L.P., Twin Falls, Idaho,
for Atlantic Media International, Inc.

Background and Facts

Successful navigation by a creditor of the path through a bankruptcy case can be a challenge. Obstacles lurk along the way. This is case serves as an example.

Creditor Atlantic Media International, Inc. ("Atlantic") asserts a claim of over \$34,000 against Debtor Glen D. Silcock arising out of his purchase from Atlantic of blank video tapes. Debtor filed for Chapter 7 bankruptcy relief on September 23, 1999. Debtor's Section 341(a) creditor's meeting was scheduled for November 15, 1999, and the Court set January 14, 2000, as the

deadline for filing any Section 523(c) adversary complaints. See 11 U.S.C. § 523(c); Fed. R. Bankr. Proc. 4007(c). Atlantic, as a creditor listed in Debtor's bankruptcy schedules, received notice of the bankruptcy filing and the deadline for filing dischargeability complaints.

Attorney Jeffrey Rolig ("Counsel") was retained by Atlantic to take the Rule 2004 examination of Debtor, with the intention that, if appropriate, Counsel would file an adversary proceeding against him to oppose discharge of Atlantic's debt under Section 523(a)(2). Debtor's attorney and Counsel were not able to schedule the Rule 2004 examination to occur before January 4, 2000. Following the exam, Counsel first learned that in 1997, his law partner had met with and advised Debtor and his spouse. Counsel concluded that because of his probable conflict of interest, he could not file the adversary complaint against Debtor.

Counsel attempted to contact another attorney to represent Atlantic, but was not able to do so. Therefore, on January 14, 1999, Counsel signed a Motion for Extension of Time and instructed his secretary, Karen Osborne, to file it with the Court via facsimile that same day. Ms. Osborne attempted to fax the motion to Pocatello, but was unsuccessful. She called the courthouse in Pocatello, and was informed by the Clerk's staff that under the

local rule all fax filings must be sent to the Clerk's office in Boise. Ms. Osborne then called someone at the Clerk's office in Boise, who in turn told her that all fax filings must be accomplished through a Boise commercial fax service, Kinko's. Ms. Osborne then called Kinko's, and was informed that the employee who handled the fax filings had gone home sick, and no one else at Kinko's was aware of the procedure for accepting fax filings. She was told she would be unable to file by fax that day at all.¹ In light of this information, Ms. Osborne decided to send the motion by mail on January 14, 1999, and she did so. Because of the intervening weekend and a holiday, the motion was received and filed by the Clerk on January 18, 1999, four days after the deadline.

Debtor opposes Atlantic's motion arguing, not surprisingly, it was not timely filed. Atlantic, through Counsel, argues that even if the motion is not timely, Atlantic should be excused from strict compliance with the deadline established in Rule 4007(c) because of the existence of "unique and extraordinary circumstances."

On January 31, 2000, the Court conducted a hearing on Atlantic's motion, and took the issues under advisement. The Court has now considered

¹ In connection with the motion, Atlantic submitted the affidavit of Ms. Osborne, attached to which is a copy of Counsel's telephone billing records indicating calls were made to the Pocatello and Boise courthouses, and to Kinko's, between 4:37 and 4:42 p.m. on January 14, 1999.

the record herein, including the briefs filed by the parties and, regrettably, the Court concludes the motion should be denied.

Analysis and Disposition

In resolving this unfortunate dilemma, the Court starts, as it must, with Rule 4007(c), which provides:

A complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be *filed* before the time has expired.

Fed. R. Bankr. P. 4007(c) (emphasis added). This Rule was specifically amended as of December 1, 1999, to require a motion for an extension of time to be “filed” rather than “made” before the deadline expired, and to thereby hopefully eliminate any confusion in the courts as to when the motion was effective for purposes of the Rule. See Fed. R. Bankr. P. 4007(c), Advisory Committee Note (1999), *citing In re Coggin*, 30 F.3d 1443 (11th Cir. 1994).

The purpose of Rule 4007(c) is to further the prompt administration of bankruptcy estates and the “fresh start” goals of relief, as well as to allow a

debtor to enjoy finality and certainty in relief from financial distress as quickly as possible. *Schunk v. Santos (In re Santos)*, 112 B.R. 1001, 1006 (9th Cir. B.A.P. 1990). As a general matter, a court is given the authority under Rule 9006(b)(1) to enlarge time periods established in the Rules within which a party must act for “cause.” However, the same Rule, in subsection (b)(3), specifically limits the court’s ability to enlarge the time periods set forth in Rule 4007(c). Instead, Rule 9006(b)(3) makes it clear an extension of time for filing a Section 523(c) complaint may only be granted to the extent and subject to the conditions contained within Rule 4007(c), one of which conditions is the timely filing of the motion to extend the time.

Moreover, as Debtor points out, an impressive collection of decisional authority stands for the proposition that a court has no discretion to enlarge the time frame for filing either a complaint or motion for extension of time under Rule 4007(c) based upon the “excusable neglect” of the creditor or its attorney. In fact, no less that the Supreme Court has held, in considering whether to forgive the failure of a creditor to timely file a proof of claim under Rule 3002(c), that based upon the language of Rule 9006(b)(3), “excusable neglect” is no justification for failing to timely file under the Rules enumerated therein. *Pioneer Investment Services Co. v. Brunswick Associates Ltd.*

Partnership, 507 U.S. 380, 389, 113 S.Ct. 1489, 1495 (1993).² As it must, Atlantic concedes this point.

Instead, citing *Anwiler v. Patchett (In re Anwiler)*, 958 F.2d 925 (9th Cir. 1992), Atlantic argues a court may use its equitable powers pursuant to Section 105(a) to “correct mistakes caused by the court” to allow an untimely motion for extension of time under Rule 4007(c) to stand. Section 105(a) empowers the court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a).

In *Anwiler*, creditors relied upon a second notice issued by the clerk in a bankruptcy case which announced an erroneous new deadline for filing a complaint to determine the dischargeability of debts. *Anwiler*, 958 F.2d at 926. The bankruptcy court granted the debtor’s motion to dismiss the creditor’s adversary complaint, which had been filed timely according to the notice, but

² This Court had so held in *In re Jones* 91 I.B.C.R. 86, 87 (Bankr. D.Id. 1991) . In *Jones*, the Court rejected a creditor’s motion for an extension of time to file a Section 523(c) complaint where the filing was delayed by a winter snow storm. (“[W]hen a creditor defers filing a complaint or a motion to extend the filing deadline until nearly the last available day under the Rules, the Court is without discretion, and perhaps should be without sympathy, when the last minute plans prove ineffective.”) In *Jones*, the Court relied in part on *In re Brown*, 102 B.R. 187, 190 (9th Cir. B.A.P. 1989), wherein the Panel rejected the pleas of a creditor that a complaint could not be timely filed due to a raging brush fire, spanning 33,000 acres and destroying 160 homes. As the Court noted initially above, the road to the bankruptcy courthouse can be a tough one indeed.

untimely under the deadline established by Rule 4007(c). The Bankruptcy Appellate Panel reversed. The Panel decided because it was the court that had made the error in the notice upon which the creditors had relied to their detriment, certainly, then, the Section 105(a) powers could be used to correct the effects of that mistake. *Id.* The Ninth Circuit agreed:

Allowing a court to correct its mistake is not inconsistent with the purpose of . . . [Bankruptcy Rule] 4007. . . . The intent behind the rules is not circumvented by allowing an untimely complaint to stand when a party relied on a court document sent before the deadline had expired.

*Id.*³ Furthermore, while Rule 4007(c) is strictly construed, compliance with the deadline “is not a jurisdictional prerequisite and a court may apply equitable doctrines to relieve a party from a failure to strictly comply with the time limits in limited circumstances.” *Sam Michael Schreiber, M.D., Inc., v. Halstead (In re Halstead)*, 158 B.R. 485, 487 (9th Cir. B.A.P. 1993), *aff’d* and adopted, 53 F.3d

³ While relied upon by the creditor as a basis for relief in *Anwiler*, and also asserted by Atlantic here, the court noted that the validity of a so-called “unique circumstances” exception to the general rule requiring strict compliance with 4007(c), discussed in dicta in other decisions, was doubtful. 958 F.2d at 928. However, the court did not directly address the issue, as it found the power to grant relief was appropriately premised upon Section 105(a). *Id.* at 929. In this context, this Court declines to recognize any such additional exception to the Rule. See also *Allred v. Kennerley (In re Kennerley)*, 995 F.2d 145, 147-148 (9th Cir. 1993).

253 (9th Cir. 1995); *Schunk v. Santos (In re Santos)*, 112 B.R. 1001, 1006 (9th Cir. B.A.P. 1990).

Against this decisional landscape Atlantic argues that the Court should invoke its equitable powers to correct its “mistake.” More specifically, Atlantic reminds the Court that it has authorized filing of documents by facsimile, and has mandated that all those desiring to fax file do so only through a designated fax service. The Court’s General Order proclaims the fax service shall be available 24 hours a day. Because Counsel’s secretary, Ms. Osborne, attempted to fax file the Motion for Extension of Time within the deadline, but was unable to do so due solely to the unavailability of personnel at the designated fax filing service, Creditor was prevented by the Court from timely filing the motion. Based upon the authority discussed above, in Atlantic’s view, the Court should intervene and grant relief from its failure to comply with Rule 4007(c). While Atlantic’s argument seems appealing, the Court, in the exercise of its discretion, must respectfully decline the creditor’s request.

A motion must be filed with the clerk or, with permission, the bankruptcy judge. Fed. R. Bankr. P. 5005(a)(1). No doubt, the United States District and Bankruptcy Courts for the District of Idaho have for some time authorized the filing of facsimile copies of documents with the clerk as a

convenience to counsel and the public. No statute or Rule requires that the Court accept facsimile documents for filing. In the latest statement concerning the subject, General Order No. 154 entered in September, 1999, while fax filing is authorized, the ground rules for this practice are also established.⁴ Several of the provisions of the General Order bear special mention here.

The Order provides that “[a] document shall be deemed ‘filed’ when it is submitted by the FAX Service and received in the Clerk’s office. Mere transmission by the sender or receipt by the FAX Service does **not** constitute ‘filing.’” General Order No. 154, ¶ 4 (emphasis in original). “All FAX filings must be made through the FAX Service approved by this Court. The FAX Service acts as the agent of the filing party and **not** as the agent of the Court.” *Id.* at ¶ 11 (emphasis in original). Kinko’s Boise Downtown Legal Copying Service is designated as the “FAX Service” in the Order. While the Order also states that “[t]he FAX Service will be open for business 24 hours . . .”, *Id.* at ¶ 12, it does not mandate that the fax service accept filings at all hours of the day.

To the Court, the plain language of the General Order discredits Atlantic’s argument that the Court, rather than Atlantic or its attorneys, has committed some error, thereby relieving the creditor of its duty to timely file its

⁴ Copies of the General Orders of the Court are available to the public and the Bar upon request, and are posted on the Court’s Internet web site.

extension motion. The General Order requires both electronic submission of a document to the service and receipt of the document by the Clerk to constitute, in the new language of Rule 4007(c), a “filing.” Neither occurred here. Of course, the Court is genuinely concerned that the designated service for receiving facsimile documents for filing with the Court was unavailable when needed by Atlantic. That incident alone, however, does not qualify Atlantic for equitable relief from the requirements of the Rules under the narrow circumstances discussed in the case law. The fax service is the filer’s agent, not that of the Clerk.⁵ Unless Atlantic can point to an error committed by the Court in the filing process, the fact that any neglect on its part could be characterized as “excusable” is of no consequence.

Conclusion

Rule 4007(c) required that Atlantic’s motion for an extension of time to commence its dischargeability action be filed with the clerk by January 14. It was filed on January 18. Atlantic cannot rely upon excusable neglect for a

⁵ Here, Atlantic complains because the fax service would not accept its documents for filing. Would the creditor have been in any better position had the fax service accepted the transmission of the documents, and then, for whatever reasons, failed to deliver them properly to the clerk’s care? The point is, if parties decide to attempt a fax filing, they accept the risks of reliability inherent in the process.

pardon. Atlantic has not shown any mistake was committed by the Court under these facts such that the Court could use its Section 105(a) powers to save the creditor. For these reasons, Atlantic's Motion for Extension of Time will by separate order be denied.

DATED This 3rd day of March, 2000.

JIM D. PAPPAS
CHIEF U.S. BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

I, the undersigned, hereby certify that I mailed a true copy of the document to which this certificate is attached, to the following named person(s) at the following address(es), on the date shown below:

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CASE NO.: 99-41594

CAMERON S. BURKE, CLERK
U.S. BANKRUPTCY COURT

DATED:

By _____
Deputy Clerk